[redacted]

INDEX

	PAGE
Petition	1
Questions presented	2
Constitutional provisions involved	3
Treaties involved	3
Statutes involved	4
Statement	4
Established facts	5
Decision of Circuit Court of Appeals	8
Specifications of errors to be urged	8
Reasons for granting writ	9
Brief in support of petition	13
Rulings and opinions below	13
Jurisdiction	13
Questions presented, treaties and statutes involved, etc.	13
Argument:	14
I. The treaty of 1909 gave petitioners redress for the unlawful flooding of their land	14
Petitioners probably had redress under general law	16
II. The decision of the Circuit Court of Appeals excluding from consideration all evidence of value arising out of special use and adaptability conflicts with decisions of Circuit Courts of Appeal in other circuits and creates confusion in the law on the subject	17
III. The decision of the Circuit Court of Appeals not only is in conflict with the decisions of the same question in other circuits, but it is probably in conflict with *Boom Company v. Patterson*, 98 *U. S.* 403; *U. S. v. Chandler-Dunbar Company*, 229 *U. S.* 53, and other applicable decisions of this Court	20
IV. The decision of the Circuit Court of Appeals is contrary to the provisions of the Treaty of 1925, and Act of May 22nd, 1926	23

PAGE

V. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions of the State of Minnesota 24

Conclusion 26

Appendix A (Pertinent provisions of the Treaty of 1909) 29

Appendix B (Pertinent provisions of the Treaty of 1925) 31

Appendix C (Pertinent provisions of the Act of May 22, 1926, as amended by Act of April 18, 1928) 34

Appendix D (Article I, section 13, Minnesota Constitution) 36

CITATIONS

Cases:

Adams v. C. B. & N. Ry. Co., 30 *Minn.* 286, 39 *N. W.* 629 25

Armendiaz v. Stillman, 54 *Tex.* 623 17

Boom Company v. Patterson, 98 *U. S.* 403 ..... 10, 11, 21, 25

City of New York v. Sage, 239 *U. S.* 57 ..... 11, 21, 22

Conan v. City of Ely, 91 *Minn.* 427, 97 *N. W.* 737 25

Cranstown v. Johnston, 3 *Ves.* 170, 30 *E.* 952 (1796) 16

Foot v. Edwards, 9 *Fed Cas. No.* 4908, 3 *Blatchf.* 310 16

Ford Hydro-Electric Co. v. Neely, 13 *Fed.* (2nd) 361 ..... 9, 17, 18, 19, 20

Kerr v. So. Park Commissioners, 117 *U. S.* 379 22

McGovern v. New York, 229 *U. S.* 363 21

Mercantile Investment Etc. Co. v. River Plate Etc. Co. L. R. (1892) 2 *Ch. Div.* 303 16

Mpls. St. P. R. & D. Elec. T. Co. v. Sedlre, 208 *Fed.* 122 25

Rickey Land & Cattle Co. v. Miller, 152, *Fed.* 11 16

Union Electric Light & Power Co. v. Snyder Estate Co., 65 *Fed.* (2nd) 297 20

U. S. v. Chandler-Dunbar Co., 229 *U. S.* 53 ..... 10, 11, 21

PAGE

Weiser Valley Land & Water Co. v. Ryan, 190 *Fed.* 417 ..... 9, 17, 19

Treaties:

Treaty of 1909 between United States and Great Britain, 36 Stat. Part II, page 2448 ..... 3, 14, 29

Treaty of 1925 between United States and Great Britain, 44 Stat. Part III, page 2108 ..... 4, 31

Constitutional Provisions:

United States Constitution, Fifth Amendment 3

Minnesota Constitution, Article I, Section 13 ..... 25, 36

Statutes:

Act of May 22, 1926, 44 Stat. Part II, page 617 ..... 4, 34

Act of April 18, 1928, 45 Stat. Part I, page 431 ..... 4, 24, 34

Miscellaneous:

Note 42 A. L. R. 210 17

7 R. C. L. Sec. 99, page 1062 17

In the Supreme Court

of the United States

OCTOBER TERM, 1933

ELIAS A. OLSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

RANDOR G. KARLSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

HARRY BREWSTER, PETITIONER,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION

I. K. Lewis, one of the attorneys for and on behalf of Elias A. Olson, Randor G. Karlson and Harry Brewster, petitioners, prays that a writ of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit in the three cases above entitled between the above named parties, which judgments were entered on August 21st, 1933,

affirming the judgments of the United States District Court for the District of Minnesota. Said three cases were tried together.

QUESTIONS PRESENTED

THE FACTS ON WHICH THE FOLLOWING QUESTIONS ARE BASED ARE STATED UNDER THE HEADING "ESTABLISHED FACTS," INFRA.

THE PRINCIPAL QUESTIONS PRESENTED ARE:

1. Whether, by the *Treaty of* 1909 *between the United States and Great Britain with respect to the Dominion of Canada* "Relating to Boundary Waters," or under general law, the flooding of land in Minnesota bordering the Lake of the Woods, caused by interference with the outflow from said lake in the Dominion of Canada, gave to the owners of such land rights and remedies for redress on account of such flooding.

2. Whether, on the established facts, the special use and adaptability of petitioners' land for water storage and hydro-electric power purposes may be taken into consideration in determining the fair market value of such land, where it is established in the record that such special adaptability and use have been recognized for many years to be of such value that an international treaty was later entered into for the purpose of acquiring the same and enabling increased electric power to be developed in Canada on payment by the Canadian Government of $275,000.00, plus 50% of any additional cost of the flowage rights.

3. Whether, on the established facts, the fact that the

flowage easement is being acquired by eminent domain would, as a matter of law, exclude from consideration in determining fair market value the special adaptability and actual use of said land for reservoir and power purposes.

4. Whether, on the established facts, the exclusion of all evidence of special adaptability and use value of said lands for reservoir and power purposes in determining market value violated the *Fifth Amendment to the Constitution of the United States*, and *Article I, Section* 13, *of the Constitution of the State of Minnesota.*

5. Whether, on the established facts, the exclusion of all evidence of special adaptability and use value of said lands for reservoir and power purposes in determining market value was contrary to the spirit or the express provisions of the *Treaty of* 1925 *between the United States and Great Britain in respect of Canada*, and *Acts of Congress* for carrying it into effect.

CONSTITUTIONAL PROVISIONS INVOLVED

1. *Fifth Amendment to the Constitution of the United States.*

2. *Article I, Section* 13, *Constitution of the State of Minnesota.* (Appendix D).

TREATIES INVOLVED

1. *Treaty of* 1909 *between the United States and Great Britain with respect to the Dominion of Canada*, 36 *Stat. Part*

II, Page 2448. (The pertinent parts of said Treaty are set forth in Appendix A).

2. *Treaty of* 1925 *between the United States and Great Britain in respect of Canada*, 44 *Stat. Part III, Page* 2108. (The pertinent parts of said Treaty are set forth in Appendix B).

STATUTES INVOLVED

Act of May 22, 1926, 44 *Stat. Part II, page* 617, *as amended by Act of April* 18, 1928, 45 *Stat. Part I, Page* 431. (The pertinent parts of the Statute as amended are set forth in Appendix C).

STATEMENT

This proceeding originated in an action by the United States to condemn a perpetual flowage easement on lands in Minnesota bordering the Lake of the Woods. On appeal from the awards of Commissioners in condemnation, judgments were entered in the United States District Court for the District of Minnesota for compensation and damage in favor of petitioners herein, who appealed therefrom to the Circuit Court of Appeals, Eighth Circuit (R. 134-135, 281). Said appeals were consolidated and heard together on one record (R. 286).

On the trial in the District Court the principal question was the measure of compensation or damage (R. 22), Petitioners claimed the right to have the jury consider, among other things, the special adaptability of their land for reser-

voir purpose, and their actual use for such purpose for thirty years (R. 25, 26). The trial Court sustained the Government's objection to all evidence of such special adaptability and use, and on Government's motion required petitioners to submit their offers of proof in typewritten form, and sustained objections thereto, allowing an exception to each adverse ruling. This plan was adopted by the Court on Government's motion as the most simple and the clearest way to raise and squarely present the question of law as to the proper measure of damage and compensation (R. 26-27, 33-41, 437). The same question was raised by petitioners' requests for instructions to the jury (R. 125-126), and by the Court's charge to the jury (R. 130).

Petitioners' offers of proof and the evidence received establish the following facts without contradiction in the record:

ESTABLISHED FACTS

The Lake of the Woods is an international boundary lake between Minnesota and Canada, with an area of about 1500 square miles, and a main shore line in Minnesota of about 140 miles (R. 427). The outlet of the lake by the Winnipeg River is in Canada. There are valuable natural water-power sites along that river. To utilize and develop these power possibilities it has been found necessary to create a storage reservoir in the Lake of the Woods and to raise the natural level of the lake, with resultant flooding of its shore lands, of which petitioners' lands form a part (R. 417).

The Minnesota shore lands embraced within the storage

reservoir total several thousand acres, the title to which is variously held by several hundred private parties, municipalities, the State of Minnesota, and the United States. Canadian shore lands are similarly owned (R. 427).

The storage reservoir was created and its value demonstrated by the Norman Dam, built for hydro-electric power purposes by the Keewatin Power Company, a Canadian corporation, at Kenora, Ontario, in 1898. The storage reservoir has been maintained and used intermittently since that date (R. 22, 24). It has increased the power capacity of the Canadian hydro-electric plants in the Winnipeg River by about fifty per cent or approximately 200,000 continuous horse-power (R. 35, 50). Petitioners' lands have been flooded intermittently and used as a necessary part of this storage reservoir, without permission or compensation since 1898 (R. 22, 23).

The owners of said shore lands employed counsel and protested to the United States Government (R. 62, 74).

In 1909 a Treaty was entered into between the United States and Great Britain with respect to the Dominion of Canada to prevent and settle disputes regarding the use of boundary waters, and creating an International Joint Commission with jurisdiction and control over such waters (Appendix A).

In 1912 questions arising out of interference with the level of the Lake of the Woods and the flooding of its shore lands were referred to the International Joint Commission. Extensive studies were made, public hearings were held, and a report with recommendations was published and filed by

the International Joint Commission, in 1917. (Final Report of International Joint Commission).

In 1925 a Treaty was consummated between the United States and Great Britain in respect of Canada embodying and putting into effect the recommendations of the International Joint Commission that a flowage easement on Minnesota shore lands be acquired. (Appendix B).

Said Treaty was put into effect by Act of Congress May 22nd, 1926, amended by Act of Congress, April 18, 1928. (Appendix C).

Under the easement acquired pursuant to Treaty, said lands will continue to be subjected to practically the same use and burden as during the past thirty years (R. 22-23).

There was conflict of interest between the power interests and municipalities in the Province of Ontario and the power interests and municipalities in the Province of Manitoba. Such conflict was substantial and fundamental and caused competition and rivalry for the possession and control of said reservoir. Such competition existed prior to 1925. The value and importance of said storage reservoir was such that the one or the other of said competing interests would have acquired the necessary flowage easement if the Treaty of 1925 had not been entered into. It would have been entirely practicable for the one or the other of said competing interests to have acquired said flowage easement (R. 37, 38-40, 51-53, 78-80).

Because of the adaptability and actual use of said shore lands for reservoir purposes, and the general interest created

therein, their market value was increased and higher prices paid for them. (R. 58-59, 64-66, 68-69, 71-72, 105-106).

The greatest interest and activity in said lands were in 1919 or 1920, five or six years before the Treaty of 1925 was enacted (R. 124). Petitioners acquired their lands before 1925 (R. 94, 100, 169).

DECISION OF CIRCUIT COURT OF APPEALS

On appeal by petitioners from the judgments entered in the District Court on the jury's verdict, the said judgments were affirmed by the Circuit Court of Appeals, by a divided Court. The reasons are set forth in the majority opinion written by Judge Stone, Presiding Judge (R. 417). There was a dissenting opinion by Judge Booth, Circuit Judge (R. 429).

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Treaty of 1909 between the United States and Great Britain in respect of Canada did not give petitioners redress for the unlawful flooding of their land.

2. In holding that petitioners had no remedy for the wrongful flooding of their lands.

3. In holding that the actual use of petitioners' lands for reservoir purposes could not be considered in determining market value.

4. In holding that the potential use and special adaptability of petitioners' lands were too remote and speculative to influence market value.

5. In holding that the exercise of eminent domain in acquiring the flowage easement necessarily excludes potential use value from consideration in determining fair market value.

6. In affirming the judgments of the District Court.

REASONS FOR GRANTING WRIT

1. The decision of the Circuit Court of Appeals in holding that the availability of petitioners' lands for the development of water-power, and the value of it for such purpose, must be excluded from consideration in determining its market value, is in conflict with the decision of the Circuit Court of Appeals, Seventh Circuit, in *Ford Hydro-Electric Company v. Neely*, 13 *Fed.* (2*nd*) 361, and with the decision of the Circuit Court of Appeals, Ninth Circuit, in *Weiser Valley Land & Water Company v. Ryan*, 190 *Fed.* 417, in both of which cases evidence of special use and adaptability was received and submitted to the jury under proper instructions.

(See Argument Point II, infra.)

2. The decision of the Circuit Court of Appeals has construed the Treaty of 1909 in a manner prejudicial to the rights of American property owners, and contrary to the terms of the Treaty, and likely to cause international misunderstanding.

The Treaty of 1909 expressly gives petitioners redress for flooding of their land. The Circuit Court of Appeals held that the treaty gave no such remedy.

(See Argument Point I, infra.)

This is an important question of federal law affecting international rights and relationships, which, so far as we have found, has not been, but should be, settled by this Court.

3. The decision of the Circuit Court of Appeals in holding that the special adaptability and actual use of petitioners' land must be excluded from consideration in fixing market value is probably in conflict with *Boom Company v. Patterson*, 98 *U. S.* 403; *U. S. v. Chandler-Dunbar Company*, 229 *U. S.* 53, and other applicable decisions of this Court, where consideration of such special use and adaptability was held proper. The majority opinion of the Circuit Court of Appeals held:

> "We think the trial Court correctly excluded consideration of this flowage use as an element of value." (R. 428).

In *Boom Company v. Patterson, supra*, this Court said p. 408):

> "Compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

(See Argument Point III, infra.)

4. The decision of the Circuit Court of Appeals that the acquistion of the flowage easement and the special use of the land by the exercise of eminent domain, necessarily excludes special use and adaptability from consideration in estimating market value is probably in conflict with *Boom Company v. Patterson, supra; United States v. Chandler-Dunbar Company, supra; City of New York v. Sage*, 239 *U. S.* 57, and other applicable decisions of this court where it was held that availability of land for special uses must be taken into consideration in determining market value.

(See Argument Point III, infra.)

5. The decision of the Circuit Court of Appeals has decided an important question involving the Constitution and law of Minnesota in a manner conflicting with the decisions of the Supreme Court of that State bearing on the same question.

By Act of Congress these condemnation proceedings are conducted "in accordance with the constitutional provisions of the State of Minnesota." The Supreme Court of the State of Minnesota has held that under the constitution and laws of that State the special adaptability and use of land must be taken into consideration in determining market value, (See Argument, Infra) whereas, the Circuit Court of Appeals has excluded all such evidence from consideration in this case.

(See Argument Point V, infra.)

6. The decision of the Circuit Court of Appeals is probably contrary to the spirit and provisions of the *Treaty of* 1925 between the United States and Great Britain, and the

Acts of Congress giving effect thereto. (See dissenting opinion of Judge Booth, R. 437-439).

(See Argument Point IV, infra.)

7. Petitioners' lands form only a small part of the Lake of the Wood storage reservoir. There are more than 400 other appeals pending in the United States District Court, District of Minnesota, wherein the same questions are involved. The parties to said appeals are awaiting the final determination of these questions by this Court. Totals involved in said appeals amount to several hundreds of thousands of dollars. The measure of compensation in condemnation proceedings is a matter of wide public interest. The law governing that question has been confused and made uncertain by the decision of the Circuit Court of Appeals. Questions affecting treaties and international relationships are involved. The Constitution and law of the State of Minnesota have been misapplied. Accordingly, the final determination of these questions by this Court is important, not only to petitioners, but to the governments of Canada and the United States and to the citizens of both countries, generally.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

I. K. LEWIS,

One of the attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION

RULINGS AND OPINIONS BELOW

The rulings of the Trial Court, Honorable John B. Sanborn, District Judge, presiding, excluding all evidence of and offers to prove the special adaptability and use of petitioners' lands appear at R. 27, 33-41 and subsequent pages. His order denying petitioners' requests for instructions to the jury appears at R. 125, 126. The Court's instruction to the jury excluding from consideration all evidence of special use and adaptability appears at R. 126, 130. Petitioners' exceptions to the charge appear at R. 132, 133.

The majority opinion of the Circuit Court of Appeals, (Stone and Booth, Circuit Judges, and Wyman, District Judge) the opinion being written by Judge Stone, Presiding Judge, appears at R. 417-429. The dissenting opinion by Judge Booth appears at R. 429-439. The opinions are not yet reported.

JURISDICTION

The judgments of the Circuit Court of Appeals in each of the three cases were entered August 21st, 1933, (R. 439, 440). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, 28 U. S. C. A. Section 347 (a), page 359.

QUESTIONS PRESENTED, TREATIES AND STATUTES INVOLVED, ETC.

A statement of the facts, the questions presented, the treaties and statutes involved, assignments of errors relied

upon, and a statement of the case will be found in the petition, supra.

ARGUMENT

I.

THE TREATY OF 1909 GAVE PETITIONERS REDRESS FOR THE UNLAWFUL FLOODING OF THEIR LAND.

The Circuit Court of Appeals, admitting that Petitioners' land was under "an actual existing use" for water-power purposes prior to 1925, excludes such "actual existing use" from consideration in determining market value because it holds that such "actual existing use" since it resulted from a trespass, could be of no value to petitioners or their grantees for the reason that they could neither prevent nor recover damage for the trespass. The Circuit Court of Appeals said (R. ft. 426, 427):

> "For more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress. There was no such hope because this trespass was occasioned by works erected in the outlet of the lake within a foreign territory by a foreign company acting under authority of the foreign government. During that entire time there could exist no value to the owner or to a prospective buyer in this use of flowage. It was a positive reducer of value. It rendered part of the land unfit for any purpose to the owner or such a buyer. Nor was there any hope of compensation for continued usage which could possibly have added to the sales value of the land. It was a pecular and unfortunate situation where the land owner was helpless."

Judge Booth dissenting from the majority opinion on this point with reference to petitioners' cause of action for the trespass and their right to enforce it, said: (R. 432)

> "The cause of action existed long prior to the Treaties of 1909 and of 1925; and the cause of action was of recognized value long before the condemnation proceedings were begun. This is shown by the record.
>
> "Article II of the Treaty of 1909 (36 Stat. 2448, 2449) provides that 'any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs'."
>
> "Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government; . . . and certainly he could obtain redress through diplomatic action between the two governments." (R. 433).

The decision of the Circuit Court of Appeals by a divided Court, has construed the *Treaty of* 1909 to mean that American property owners whose property is damaged on the American side because of interferences with boundary waters on the Canadian side of the boundary, have no right either to enjoin the trespass or to recover damage therefore.

That construction of the Treaty is necessary to the decision of the majority of the Court. No other reason is given for excluding from consideration the actual use value, which the Court has found to exist in fact.

Admittedly such a decision of a question of federal and international law is of great and far reaching importance. The *Treaty of* 1909 is not confined to the Lake of the Woods but applies generally to all boundary waters, between the United States and Canada.

PETITIONERS PROBABLY HAD REDRESS UNDER GENERAL LAW

Likewise the majority decision assumes to decide the rights of American property owners under general law.

As pointed out in the dissenting opinion of Judge Booth, the majority decision is in conflict with established principles of general law which probably afforded petitioners redress independently of the *Treaty of* 1909 (R. 433).

Rickey Land & Cattle Company v. Miller,
152 *Fed.* 11, *at* 15.

Foot v. Edwards,
9 *Fed. Cases* 358, 359, *Case No.* 4903.
3 *Blatchf.* 310.

Cranstown v. Johnston,
3 *Ves.* 170. 30 *E.* 952, (1796).

Mercantile Investment Etc. Co. v. River Plate Etc. Co.
L. R. (1892) 2 *Ch. Div.* 303.

Armendiaz v. Stillman,
54 Tex. 623, *at* 627.

7 *R. C. L. Section* 99, *page* 1062.

Note, 42 *A. L. R.* 210 *and*
cases therein cited.

But we do not here discuss the question on its merits. We urge only that the Circuit Court of Appeals by a divided Court has construed the Treaty of 1909, and in so doing has decided an important federal question, and has also decided a question of general law probably in conflict with the weight of authority. Its decision is of far-reaching importance in the harmonious relationship between the United States and the Dominion of Canada. The question should be finally determined by this court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS EXCLUDING FROM CONSIDERATION ALL EVIDENCE OF VALUE ARISING OUT OF SPECIAL USE AND ADAPTABILITY CONFLICTS WITH DECISIONS OF CIRCUIT COURTS OF APPEAL IN OTHER CIRCUITS AND CREATES CONFUSION IN THE LAW ON THE SUBJECT.

The Circuit Court of Appeals' decision squarely conflicts with *Ford Hydro-Electric Company v. Neely*, 13 *Fed.* (2*nd*) 361, Seventh Circuit, and with *Weiser Valley Land & Water Company v. Ryan*, 190 *Fed.* 417, Ninth Circuit.

These three cases are identical in principle. Each arises out of condemnation of flowage rights. In each case the land

condemned was insufficient when taken alone to complete the project. It had to be unified with other lands. This unification was accomplished by eminent domain. In each case the question was whether evidence of special adaptability and use value may be considered in determining market value.

The Circuit Court of Appeals of the Seventh and Ninth Circuits concur in holding that such evidence is competent, while the Circuit Court of Appeals of the Eighth Circuit holds directly the opposite.

The Circuit Court of Appeals in the instant case held:

> "We think the trial Court correctly excluded consideration of this flowage use as an element of value." (R. 428).

The Circuit Court of Appeals of the Seventh Circuit in *Ford Hydro-Electric Company v. Neely, supra*, in holding evidence of special use and adaptability competent, stated (p. 362):

> "The objection made to the question asked, and now urged to the testimony given by both witnesses, goes to the competency of the evidence sought and brought out; that is, to the competency of evidence as to peculiar fitness of the land for particular purposes as an element in estimating its value. That this is proper evidence to be considered by the jury in determining the market value of the land has been often decided. . . . The evidence objected to threw light upon the availability of the land for water power purposes and the value of such element, as bearing upon what might be paid for it by one desiring to purchase it, and thus bore upon its market value. . . . The availability of the land for the development of water power, and the value of it for

such purposes, was a proper element to be considered by the jury in fixing its market value."

Application to this Court for a Writ of Certiorari to the Circuit Court of Appeals, Seventh Circuit, in *Ford Hydro-Electric Company v. Neely, supra,* denied: 273 U. S. 723.

The Circuit Court of Appeals of the Ninth Circuit in *Weiser Valley Land & Water Company v. Ryan,* 190 *Fed.* 417, in likewise holding such evidence of special adaptability and use competent, stated (p. 423):

> "In forming their estimates of value, the defendants were entitled to have the witnesses take into consideration the land 'for the most advantageous use to which it may be applied'. . . . All the uses to which the property is available, the more advantageous as well as the less advantageous, should be taken into view, and the general estimate of the market value should be deduced. . . ."

The foregoing language and holdings are in square conflict with the holding of the Circuit Court of Appeals in the instant case. The dissenting opinion of Judge Booth conforms with the holdings of the Circuit Courts of Appeal of the Seventh and Ninth Circuits. Judge Booth stated: (R. 437):

> "The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions."

Such conflict between the Courts of different Circuits must result in confusion and injustice.

Such confusion has already occurred, and in the Eighth

Circuit. During the very time that the instant case was under consideration by the Circuit Court of Appeals three other Judges of the same Court decided substantially the same question in the opposite way.

Union Electric Light & Power Co. v. Snyder Estate Company,
65 *Fed.* (2*d*) 297.

On April 24, 1933, the Circuit Court of Appeals, Eighth Circuit, in the *Union Electric Case*, cited *Ford Hydro-Electric Company v. Neely, supra*, with approval, and stated, page 304:

> "Testimony as to the value of the property, based on its availability for water power development, was properly admissible as affecting its market value. *Ford Hydro-Electric Company v. Neely,* (*C. C. A. 7th*) 13 *Fed.* (2*d*) 361."

On August 17th, 1933, the Circuit Court of Appeals, Eighth Circuit, in the instant case held squarely to the contrary, and stated:

> "We think that the Trial Court correctly excluded consideration of this flowage use as an element of value." (R. 428).

Such conflict not only between the Circuit Courts of Appeal of the several Circuits, but between decisions of the same Court, should be adjusted. This can be rectified only by a final decision and restatement of the law by this Court.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS NOT ONLY

IS IN CONFLICT WITH THE DECISIONS OF THE SAME QUESTION IN OTHER CIRCUITS, BUT IT IS PROBABLY IN CONFLICT WITH BOOM COMPANY V. PATTERSON, 98 U. S. 403, U. S. *v.* CHANDLER-DUNBAR COMPANY, 229 U. S. 53, AND OTHER APPLICABLE DECISIONS OF THIS COURT.

The majority opinion of the Circuit Court of Appeals excludes from consideration all evidence of special use and adaptability and among other cases relies upon *McGovern v. New York*, 229 *U. S.* 363; *U. S. v. Chandler-Dunbar Company*, 229 *U. S.* 53.

The majority of the Circuit Court of Appeals decided that where the special use is possible only through the exercise of eminent domain it must be excluded from consideration in estimating value. This holding is in conflict with the decision of this Court in *U. S. v. Chandler-Dunbar Company, supra*, and *Boom Company v. Patterson, supra.*

McGovern v. New York, supra, and *New York v. Sage*, 239 *U. S.* 57, relied on by respondent below, do not hold that evidence of special use and adaptability is incompetent in determining market value as was held by the Circuit Court of Appeals in the instant case. What the *McGovern* and *Sage* cases hold is that the value of the land for some special use and adaptability may not be taken as the measure of just compensation in lieu of market value. The *McGovern* and *Sage* cases simply hold that market value, and not some special value which might be found in a peculiar use or adaptability, is the measure of just compensation. In the instant case the question was, What evidence is competent to prove market value? Obviously, the two questions involve entirely different considerations.

Indeed, the *McGovern case* refers to *U. S. v. Chandler-Dunbar, supra.* In the *Chandler-Dunbar case,* where a piece of land was being condemned for public purposes, this Court held it proper to take into consideration the peculiar adaptability of the land in determining its market value. This Court said (pp. 76-77):

> "That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, *it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.*" (Italics ours.)

Likewise this Court said in *City of New York v. Sage, supra* (p. 61):

> "The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account *if the union of properties necessary is so practicable that the possibility would affect the market price.*" (Italics ours.)

The record in the instant case establishes, without contradiction, that the market price was actually affected and increased.

Kerr v. So. Park Commissioners, 117 *U. S.* 379, is relied upon in the majority decision (R. 428). It will be found

that the *Kerr case* does not support the Circuit Court of Appeals' decision. See pages 385, 387 of 117 U. S. See also *Boom Co. v. Patterson, supra.*

On this branch of the case the dissenting opinion of Judge Booth (R. 438) states:

> "The cases of *United States v. Chandler-Dunbar Co.*, 229 *U. S.* 53; *McGovern v. New York*, 229 *U. S.* 363; *and New York v. Sage*, 239 *U. S.* 57, relied upon by the appellee, lend support rather to the contentions of appellants in the cases at bar, when comparison is made between the facts disclosed in those cases and the facts disclosed in the cases at bar."

(See also Judge Booth's analysis of cases R. 438-439.)

We submit that the conflict between the Circuit Court of Appeals' decision and the decision of this court on the same question is fundamental and important. It should be rectified by a final determination of the question and a restatement of the law by this court.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO THE PROVISIONS OF THE TREATY OF 1925, AND ACT OF MAY 22*nd*, 1926:

That the Circuit Court of Appeals' decision construes and gives effect to the Treaty and to the Act of Congress, and accordingly decides an important question of federal law involving the rights of many private citizens, as well as international relationships, will not be questioned. That the de-

cision is contrary to the spirit, if not to the express provisions, of said Treaty and Statute is demonstrated in the dissenting opinion of Judge Booth, as follows (R. 437, 438):

> "The rulings of the Court on the offers to prove and the charge of the Court were, it seems to me, contrary to the spirit, if not to the express provisions, of the treaty of 1925 and the Act of Congress for carrying it into effect.
>
> "The treaty provides (Article IX, supra):
> 'The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.'
>
> "The statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.
>
> "The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages." (Statute referred to by Judge Booth, Appendix C).

V.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS OF THE STATE OF MINNESOTA.

Act of April 18, 1928, 45 *Stat. Part. I, Page* 431, provides that these condemnation proceedings shall be

"in accordance with the constitutional provisions of the State of Minnesota."

Section 13 of Article I of the Constitution of the State of Minnesota provides that:

> "Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."

The easement here in question is such property.

Adams v. C. B. & N. Ry. Co.,
39 *Minn.* 286,
39 *N. W.* 629.

Mpls., St. P. R. & D. Elec. T. Co. v. Searle,
208 *Fed.* 122.

The Minnesota law conforms to the decision of this Court and holds that evidence of special use and adaptability is competent for consideration in determining market value.

Conan v. City of Ely,
91 *Minn.* 127,
97 *N. W.* 737.

In the *City of Ely case* the Minnesota Supreme Court quoted with approval from the opinion of this Court in *Boom Company v. Patterson, supra*, and added (p. 131):

> "In the same line this court has held that a person is entitled to the fair value of his property for any use to which it is adapted, and for which it is available, and for which it may be sold. He is entitled to the value of his property for any use to which it may be applied, and for which it would ordinarily sell in the market, whether that use be one to which it is presently applied, or some other to which it is adapted."

Clearly the Circuit Court of Appeals' decision conflicts with the local law of Minnesota.

CONCLUSION

Petitioners respectfully urge that the questions involved in these proceedings are all of general interest and of national and international consequence; that they should be reviewed and finally determined by this court for the following reasons:

1. That the Circuit Court of Appeals' decision conflicts with the decisions of Circuit Courts of Appeal in other Circuits; that confusion has resulted, and is certain to result, from such conflict. That it has decided an important question of local law contrary to the decisions of the Supreme Court of the State of Minnesota, and that it is in conflict with the decisions of this Court.

2. That the questions on which the Circuit Court of Appeals' decision is in conflict, as herein stated, are of far reaching importance in that the decision has caused, and will be certain further to cause, confusion in determining damage and just compensation for property taken by the exercise of eminent domain; that extensive public improvements are going forward throughout the country, and that the power of eminent domain is generally employed; that the questions involved in the Circuit Court of Appeal's decision are necessarily involved in practically every condemnation proceeding, and consequently effect the public interest vitally. That more than 400 other cases arising out of this same condemnation proceeding, involving several hundreds of thous-

ands of dollars in value, and the same identical questions, await final determination by this Court; that, until this Court determines said questions, the measure of just compensation in condemnation proceedings generally, wherever special use and adaptability are involved, will remain in the realm of confusion and uncertainty.

3. That the Circuit Court of Appeals' construction of the Treaties of 1909 and 1925, and the Acts of Congress with reference thereto, is erroneous and prejudicial and vitally affects, for all time, not only the relationship between the United States and Great Britain as regards their international boundary waters, but also the property rights of large numbers of citizens in both countries.

Questions of such far-reaching importance to the rights of many people, to the uniformity of judicial decisions, and to international cordiality, should be finally determined by this Court, by issuance of the Writ of Certiorari as prayed for in the petition.

Respectfully submitted,

I. K. LEWIS,
C. E. BERKMAN,
JOHN H. HOUGEN,
and
LEWIS, HUNT & PALMER,
500 First National Bank Bldg.,
Attorneys for Petitioners.

(Attorneys' names continued on next page)

HARRY H. PETERSON,
Attorney General,

DAVID J. ERICKSON,
Assistant Attorney General,
For the State of Minnesota.

C. F. GAARENSTROOM,
Counsel for the Conservator
of the Rural Credit Department of Minnesota.

APPENDIX A

PERTINENT PARTS OF THE TREATY OF 1909 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA. 36 STAT. PART II, PAGE 2448.

"The United States of America and His Majesty the King of the United Kingdom of Great Britain . . . being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends . . ."

ARTICLE II.

"Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the

boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties hereto. * * * *"

ARTICLE III.

"It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission." * * *

ARTICLE IV.

"The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the

boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission."
* * *

ARTICLE VIII.

"This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required. * * *"

"In cases involving the elevation of the natural level of the waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters, or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby. * * *"

APPENDIX B

PERTINENT PARTS OF THE TREATY OF 1925 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA, 44 STAT., PART III, PAGE 2108.

"The United States of America and his Majesty the King of the United Kingdom of Great Britain * * *

"Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the Lake on each side of the boundary between the two countries, and

"Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18th, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of the United States of America and Canada,

"Have resolved to conclude a Convention for that purpose. * * *"

ARTICLE VIII.

"A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement. * * *"

ARTICLE IX.

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

"Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

ARTICLE X.

"The Governments of the United States and Canada shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles VII, VIII, and IX.

"In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada."

PERTINENT PARTS OF PROTOCOL ACCOMPANYING CONVENTION TO REGULATE THE LEVEL OF THE LAKE OF THE WOODS.

"2. Should it become necessary to set up a special tribunal to determine the cost of the acquisition of the flowage easement in the United States provided for in Article VIII of the Convention, the Government of Canada shall be afforded an opportunity to be represented thereon. Should the cost be

determined by means of the usual judicial procedure in the United States, the Government of Canada shall be given the privilege of representation by counsel in connection therewith."

APPENDIX C

PERTINENT PARTS OF THE ACT OF MAY 22, 1926, 44 STAT. PART II, PAGE 617, AS AMENDED BY ACT OF APRIL 18, 1928, 45 STAT. PART I, PAGE 431.

"That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this act, by purchase or by condemnation, in accordance with the provisions of the Act entitled 'An Act to authorize condemnation of land for sites for public buildings, and for other purposes,' approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand sixty-four sea-level datum upon all lands in such state bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such state along the shores of the Lake of the Woods and the banks of the Warroad River and the Rainy River as specified in Article 8 of the Convention signed at Washington on the 24th day of February, 1925, between the Governments of the United States and Great Britain, providing for the regulation of the level of the Lake of the Woods.

"In proceeding by condemnation for acquiring such flowage easements on any tract of land any benefit to the remainder of the tract or the property thereon derived from such easement shall be considered and damages shall be awarded accordingly.

"Sec. 2. * * * All moneys which may be paid by the Government of Canada to the Government of the United States under Article 10 of the Convention are hereby appropriated and made available for expenditure by the Secretary of War for the construction of such works, and the carrying out of such measures, and for the acquisition of easements, lands, and interests therein, as provided in Section 1 of this Act. * * *

"Sec. 3 The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in the outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based. * * *"

APPENDIX D

ARTICLE I, SECTION 13, CONSTITUTION OF MINNESOTA

"Section 13. Private Property for Public Use—Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."